SOON HUAT CONSTRUCTION SDN BHD

v.

KIONG SIANG CONSTRUCTION SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CIVIL APPEAL NO: 12-27-99-III(1)]
25 AUGUST 1999

CIVIL PROCEDURE: *Appeal - Record of appeal - Appeal to High Court - Application to extend time to file record of appeal - Whether Sessions Court the proper forum for such application - Subordinate Courts Rules 1980, O. 49 r. 6(3) & O. 3 r. 5(1)*

CIVIL PROCEDURE: *Appeal - Record of appeal - Application for extension of time to file - Mistake by advocate resulting in filing of record of appeal out of time - Whether may be considered as a factor in deciding to grant extension - Sinnathamby & Anor v. Lee Chooi Ying & Anor - Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Ors - Delay in making application to extend time - Whether delay explained - Whether extension of time ought to be granted*

This was the defendant's appeal against the decision of the Sessions Court dismissing its application ('the said application') for an extension of time to file its record of appeal. The defendant's advocate explained that he was not aware that the service of the record of appeal was out of time because he had proceeded under the mistaken belief that the rule applicable was O. 49 r. 3A(3) & (4) of the Subordinate Courts Rules 1980 ('the SCR'). Therefore, the defendant's advocate contended that he did not even see the need to apply for an extension of time before serving and filing the record of appeal. The issues that arose for determination were: (i) whether the Sessions Court, being the court appealed from, was the proper forum to which the said application was made; (ii) whether the mistake of an advocate could be a ground for the court to extend time; and (iii) whether the delay in making the said application was excusable.

Held:

[1] The filing of a record of appeal is an act required or authorised by the SCR to be done within the time period prescribed by O. 49 r. 6(3) thereof. Consequently, O. 3 r. 5(1) of the SCR is relevant and applicable, and the Sessions Court has the jurisdiction to hear an application to extend the period within which a record of appeal has to be filed in the High Court. The Sessions Court was thus the proper forum to which the said application was made.

[2] An application for an extension of time relying on a mistake of a solicitor should not be dismissed outright but must be considered together with other factors like the length of the delay and the likelihood of prejudice to the other party. The Supreme Court case of *Sinnathamby & Anor v. Lee Chooi Ying & Anor* should be preferred over the Supreme Court case of *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Ors* as the latter case did not refer to the former case and consequently, it did not say why its own decision should not be followed. Whereas, the former case dwelt with previous cases and gave its reasons for concluding that those decisions which held that the mistake of a solicitor could not be a ground for the court to exercise its discretion to grant an extension of time were no longer good law.

[3] Even assuming that O. 49 r. 3A(3) & (4) of the SCR was the rule applicable, the record of appeal was served 2 days late. This delay was attempted to be explained away by the defendant's advocate's contention that he was preoccupied with other cases at that time. Thus, the Sessions Court judge was correct when she did not accept the contention of the appellant's advocate that he thought he had complied with O. 49 r. 3A(3) & (4) of the SCR. By his attempt to explain the delay, the advocate knew he was out of time by two days and could not, therefore, have sincerely believed that he had complied with O. 49 r. 3A(3) & (4) of the SCR.

[3a] The advocate did not explain why, despite knowing he was out of time by two days when he was acting under the wrong rule, he did not apply immediately for an extension of time before he served and filed the record of appeal. Therefore, the question why he did not apply for the extension of time after realising he was two days late and before he served the record of appeal was left unanswered.

[Appeal dismissed with costs.]

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Enkei Automotive Co Ltd & Anor [1997] 2 CLJ 392 ***(refd)***

Chong Kueng Ying & Ors v. Lovis Lavagna [1972] 1 MLJ 180 ***(refd)***

Gatti v. Shoosmith [1939] 3 All ER 916 ***(cit)***

Ishak Hj Shaari v. PP [1997] 3 CLJ Supp 223 ***(cit)***

Karunakaran v. Wong Yen Choong & Anor [1990] 2 MLJ 99 ***(cit)***

Lee Lan v. Lim Yoon Loy & Ors [1991] 3 CLJ 2393 ***(foll)***

Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Ors [1995] 4 CLJ 484 ***(not foll)***

Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 2 AMR 30:1568 ***(cit)***

Sinnathamby & Anor v. Lee Chooi Ying & Anor [1987] 1 MLJ 110 ***(foll)***

Tractors Malaysia Bhd v. Southern Estates Sdn Bhd & Anor [1984] 1 MLJ 118 ***(not foll)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule item 8
Rules of the High Court 1980, O. 3
Subordinate Courts Rules 1980, O. 3 r. 5(1), O. 49 rr. 2, 3A(3), (4), 6(3)

For the plaintiff - Allan Lao; M/s David Allan Sagah & Teng
For the defendant - Kho Lik Khiat; M/s Kho & Poh

Reported by S Dharmendran

JUDGMENT

Ian HC Chin J:

Introduction

This is an appeal against the decision of the Sessions Court judge made on 15 April 1999 by which she dismissed an application for an extension of time to file the Record of Appeal. Three issues arose for consideration. One is whether the Sessions Court is the proper court to which an application for an extension of time to file the Record of Appeal in the High Court is made. The other issue is whether the mistake of an advocate can be a ground for the court to exercise its discretion to extend the time. The third issue is whether there was excusable delay in making the application for the extension of time.

Jurisdiction

The Sessions Court judge was of the view that she had the jurisdiction to grant an extension of time to file the Record of Appeal in the High Court since, according to her, O. 49 r. 6(3) of the Subordinate Courts Rules 1980 (SCR) prescribes the time within which the Record of Appeal is to be filed in the High Court and O. 3 r. 5 of the SCR allows an extension of time for doing any act required by the SCR. She also relied on *Lee Lan v. Lim Yoon Loy & Ors* [1991] 3 CLJ 2393; [1991] 3 MLJ 419 SC. That case concerns the service of a notice of appeal and the Supreme Court there held that "as the time prescribed for the filing and service of the notice of appeal 'is required or authorised by these rules', *ie*, SCR O. 49, it follows that the proper forum to apply for extension of time is the court appealed from." The Supreme Court also held that though an application could also be made to the High Court which has jurisdiction to entertain such an application under item 8 of the Schedule to the Courts of Judicature Act 1964, the application should in the first instance be made to the lower court. Though that case concerns a notice of appeal, and not a Record of Appeal, it is nevertheless relevant because the decision turns on the interpretation of O. 3 r. 5 of the SCR with which the present case is also concerned. The Supreme Court there was of the view that

since the time for service of the Notice of Appeal was prescribed by the then O. 49 r. 2, it, thus, came within the ambit of O. 3 r. 5, since the service of a Notice of Appeal is the doing of an act within a prescribed time, prescribed under the SCR. Applying the same approach as done in that case, the first question to ask is whether the filing of the Record of Appeal is an act within a certain time prescribed by the SCR. The answer is yes and it is provided by O. 49 r. 6(3) of the SCR which was only introduced in 1993. Since it is an act required by the SCR, it is within the ambit of O. 3 r. 5(1) and thus the Sessions Court has jurisdiction to extend the time. Mr. Allan Lao, learned counsel for the respondent, argued that because the Notice of Appeal was already lodged with the High Court and the High Court had consequently registered the appeal the High Court was seised of jurisdiction over the matter. Consequently the lower court has no jurisdiction. That argument calls for answers to many questions. One of which is why there is no provision made in the Rules of the High Court 1980 (RHC) as to the time for the filing of the Record of Appeal? The second question is why was the amendment made to the SCR providing for the time to file the Record of Appeal and not to the RHC if it was intended to exclude the lower court from having the jurisdiction to extend time. From those facts, it can be concluded that the legislature had intended that the lower court should have jurisdiction to extend the time for the filing of the Record of Appeal in the High Court; especially so, when the amendment to the SCR providing for the filing of the Record of Appeal came after, though not necessarily because of, the decision of *Lee Lan v. Lim Yoon Loy & Ors*. Furthermore, since the time for filing of the Record of Appeal is not prescribed by the RHC, the High Court's jurisdiction which it has concurrently with the lower court, would come not by virtue of O. 3 of the RHC but by virtue of item 8 to the Schedule of the Courts of Judicature Act 1964 as decided in *Lee Lan v. Lim Yoon Loy & Ors*. Therefore, the Sessions Court judge was right in her decision that she had jurisdiction to hear an application for the extension of time to file the Record of Appeal in the High Court.

Mistake

The Sessions Court Judge was of the view that the mistake of an advocate as to the time within which the Record of Appeal has to be filed cannot be a sufficient ground for an extension of time. Unfortunately, the cases of *Sinnathamby & Anor v. Lee Chooi Ying & Anor* [1987] 1 MLJ 110 SC and *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Ors* [1995] 4 CLJ 484; [1995] 3 MLJ 465 SC were not drawn to the attention of the Sessions Court judge. Before the decision of *Sinnathamby & Anor v. Lee Chooi Ying & Anor*, the courts had always considered that a mistake of law on the part of the solicitor cannot be a ground for the court to exercise its discretion. However,

Sinnathamby & Anor v. Lee Chooi Ying & Anor, with the quorum comprising Mohamed Azmi, Syed Agil Barakbah and Wan Hamzah SCJJ, appears to have changed that position. This is what the Supreme Court said, at p. 112:

> Under r. 13 of the repealed Federal Court (Civil Appeals) (Transitional) Rules 1963, "special leave" of the full court was required to bring an appeal out of time, but under the present r. 56 of Rules of the Supreme Court 1980 the word "special" has been omitted, and because of this change in the law which requires only ordinary leave, it is argued that the mistake of a legal adviser is no longer a ground for refusing an application for extension of time to appeal. In my view this is not so, for the effect of the change in the law merely widens the court's unfettered discretion under r. 56. In exercising its discretion, the court would *inter alia* consider the reason for the delay, the length of the delay and the likelihood of prejudice to the successful party in the court below. In view of the change in the law which no longer requires "special leave", where the mistake of a legal adviser is advanced as the reason for the delay, the Court is now free to consider it on its merits in the same manner that the court would exercise its discretion in other cases. Thus, the ruling in *Re Coles & Ravenshear* [1907] 1 KB 1 and as well as *Chong Kueng Ying & Ors v. Lovis Lavagna* [1972] 1 MLJ 180 , which excluded the court's discretion in cases where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980. For the purpose of r. 56, this court should be guided by the principle adopted by the Court of Appeal in England after the 1909 amendment of the English RSC as to extension of time for appeal. In *Gatti v. Shoosmith* [1939] 3 All ER 916, the Court of Appeal allowed extension of time where the delay was only a matter of a few days and the appellants' solicitor, within time, had informed the respondent's solicitors by letter of their intention to appeal. On the facts of that case, although the notice of appeal was not served within the strict time, due to the appellants' solicitor's misunderstanding of the law, the court exercised its discretion in granting leave to appeal out of time. But *Gatti's* case is no authority for the proposition that because of the change in the law from special to ordinary leave, the court has no more discretion to refuse an application under r. 56 where the delay is caused by the mistake of a legal adviser. This is made clear in the judgment of Sir Wilfred Greene MR at p. 919 where he said:
>
> > On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser may be a sufficient cause to justify the court in exercising its discretion. I say "may be" because it is not to be thought that it will necessarily be exercised in every set of facts.

> In *Palata Investments Ltd & Ors v. Burt & Sinfield Ltd & Ors* [1985] 2 All ER 517, the English Court of Appeal, following *Gatti's* case also exercised its discretion in favour of the appellants where the delay was held to be an exceptional one *viz*, merely three days out of time, and the respondent's solicitors knew that there was in all likelihood to be an appeal, so that prejudice to the respondent was non-existent.

There the Supreme Court is explicit in explaining that the mistake of a solicitor may be a factor to be taken into consideration when deciding whether or not to exercise its discretion though it will not necessarily be exercised. It also said that *Chong Kueng Ying & Ors v. Lovis Lavagna* [1972] 1 MLJ 180, a decision of the Federal Court (as the Supreme Court was then known) constituted by Azmi LP, Suffian FJ, HS Ong FJ, is no longer good law. That case concerns an application for leave to appeal out of time arising from a failure to serve the notice of appeal within time. The ground on which special leave was asked was that the appellants' legal adviser had made a mistake. The court there held that the mistake of a legal adviser is not sufficient ground for granting leave. In my view it must follow that *Tractors Malaysia Bhd v. Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118 FC which held:

> (4) the mistake of the appellant's solicitors on a point of law cannot constitute sufficient grounds for granting the extension of time to file notice of appeal. As there were no special grounds shown for the court to exercise its discretion under r. 56(a) of the Rules of the Federal Court, 1980, this was not a proper case in which extension of time should be allowed.

should also, by implication, be said to be no longer good law.

Even though *Sinnathamby & Anor v. Lee Chooi Ying & Anor* concerns the filing of a notice of appeal against a decision of the High Court it nevertheless is concerned generally with the exercise of a discretion to grant an extension of time. Therefore, it is relevant to the present case and binding. This means that an application for an extension of time relying on the mistake of a solicitor should not be dismissed outright but must be considered together with other factors like the length of the delay and the likelihood of prejudice to the other party.

In the Court of Appeal in *Alloy Automotive Sdn Bhd v. Enkei Automotive Co Ltd & Anor* [1997] 2 CLJ 392; [1997] 3 MLJ 205 CA it was contended that the mistake of a solicitor could be a factor to be taken into consideration when explaining the delay in filing and serving the memorandum and appeal record. Unfortunately, the case of *Sinnathamby & Anor v. Lee Chooi Ying & Anor* was not referred to, presumably because it was not cited. Though the cases of *Gatti v. Shoosmith* and *Chong Kueng Ying & Ors v. Lovis Lavagna*, which were considered in *Sinnathamby & Anor v. Lee Chooi Ying & Anor*, were cited in argument and mentioned by the Court of Appeal, there was no comment on them. The Court of Appeal had only this to say, at p. 209-211:

This court viewed that there was a blatant disregard by the appellant's solicitors of the court's procedure. It is also the view of this court that to a certain extent, the appellant could not escape and was partly to blame for the delay in the filing of the appeal record. The appellant, we feel, should have been more vigilant and alert as to the state of its pending matter. We feel the appellant should have the attentiveness to check on the action of the solicitors it employed and paid for. If the case was delayed, the appellant should have pursued the matter as a diligent litigant and even to the extent of firing its solicitors and changing to a new solicitor who could do a better job. After all, it was paying and had the right to call the tune. The appellant was the master and the solicitors were only its agent. We could not subscribe and sympathize with the appellant's counsel's submission that his client presumed everything was in order until the letter from the Court of Appeal dated 29 June 1995.

It is also our considered view that the client having such a solicitor should have been more concerned as to the state of its case if it was so injured as it claimed.

As for being vigilant, we took note and found substance in the submission of counsel for the respondents that an order of committal as a result of non-compliance with an injunction was made against one of the appellant's directors dated 12 February 1996. The appellant made a complaint against that order. In pursuing its complaint, the appellant's matter was taken over by Philip Choong & Co. From May 1995 to July 1995, it should have dawned on the appellant anything could have gone wrong with its matter in court. The appellant should have woken up and conducted an urgent enquiry to protect its interest. This the appellant failed to do.

In coming to the conclusion to dismiss the appellant's application, we considered and found merit in the respondents' counsel's argument that two High Court judges have heard the appellant's claim on its merit. Arifin Jaka J conducted a full hearing and he turned down the appellant's application to set aside the order of 5 October 1994.

Also significant in our consideration was para 10 of the affidavit of Hitoshi Suzuki which provides thus:

…

Roughly translated:

(10) In any situation, the Department of the Registrar of Trade Marks had deleted Registration No 86/00087 from the Register of Trade Marks. Herein is exhibited and marked 'A7' is a copy of the gazette adverting to the said cancellation. Thereafter, the trade mark 'Enkei' is now registered in the first respondent's name. It is herein exhibited and marked 'A8' is a copy of the certificate of registration.

> In the premises, the respondent prays for dismissal of the appellant's application for extension of time for the filing and service of the memorandum and appeal record.
>
> For reasons stated above and considered in its entirety, with due respect, we were unable to discover any merit in the application of the appellant and in the exercise of our discretion, we find the balance of convenience lies in favour of refusing the appellant's applications with costs to the respondents.
>
> Application dismissed.

I am unable to say whether from the passage quoted the Court of Appeal had rejected the argument that the mistake of a solicitor can be considered. Since *Sinnathamby & Anor v. Lee Chooi Ying & Anor* is a Supreme Court case and binding on the Court of Appeal, the decision of the Court of Appeal must be read as not having rejected the rule laid down by *Sinnathamby & Anor v. Lee Chooi Ying & Anor* that a mistake of the solicitor can be considered.

Three High Court cases had since followed *Sinnathamby & Anor v. Lee Chooi Ying & Anor*. These are *Scott & English (M) Sdn. Bhd. v. Leikie Refrigeration & Stainless Steel Industries Sdn. Bhd. & 2 Ors* [1994] 2 AMR 30:1568; *Ishak bin Hj Shaari v. Public Prosecutor* [1997] 3 CLJ Supp 223; [1997] 5 MLJ 28 and *Karunakaran v. Wong Yen Choong & Anor* [1990] 2 MLJ 99.

Thus far it seems clear that the mistake of a solicitor can be a factor that can be considered. However, the case of *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn. Bhd. & Ors* seems to unsettle the law. That case concerns an application for the extension of time to file the record and memorandum of appeal. The solicitor in that case did not request for the notes of evidence within one week of the filing of the notice of appeal. He was under the mistaken impression that the request need only be made within one week of the expiry of one month from the date of filing of the notice of appeal. The judge's secretary wrote on 23 November 1992 to say the notes were still being typed. An application was then made, under the practice directions, for an extension of time to file the record of appeal on the grounds that the notes of evidence had not been supplied but was refused for reason that the application for the notes of evidence was not made within time. Hence the application to the Supreme Court on December 21 for the extension of time. The Supreme Court, comprising Anuar CJ, Wan Adnan FCJ and Zakaria Yatim JCA, at p. 470-471, said this when dismissing the application:

> In the present case, when the deputy registrar refused the extension of time she was merely carrying out an administrative duty pursuant to the practice direction. Practice directions are intended to be no more than a direction for administrative purpose. (See *Jayasankaran v. PP* [1983] 1 MLJ 379 at p 380.) Under r. 62(7), the authority empowered to grant an extension of time is the

court. Rule 2 of the RSC defines 'Court' to mean the Supreme Court or a judge of that court. Therefore, any application for extension of time to file the record of appeal must be made to the Supreme Court or to the judge of that court. Rule 62(7) provides that the memorandum and record of appeal shall be filed at the place where the appeal was entered within six weeks after the entry of the appeal or within such further time as the court may allow.

The present application for extension of time was filed on 21 December 1992, that is more than eight weeks after the date of the filing of the notice of appeal. On 23 November 1992, the secretary to the learned judge wrote to the appellant's solicitors that he was still typing the notes of evidence. The appellant knew that there was a lengthy trial and that the secretary would take some time to type the notes of evidence. Yet the appellant did not deem it fit to apply to this court for extension of time. The appellant waited until after the expiry of the six-week period to make the present application.

Under r. 62(7), the court has the discretion to grant an extension of time to file the record of appeal. The appellant may even file the application after the expiry of the six-week period provided it has good reasons for doing so. In the present case, the appellant knew that it would take some time for the notes of proceedings to be typed. It was not diligent enough to file the application upon receiving the letter from the secretary to the learned judge dated 23 November 1992.

In *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228, the Privy Council (on an appeal from the Court of Appeal of the Federation of Malaya) said in its judgment at p 229, that the 'rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time there must be some material upon which the court can exercise its discretion'.

In the present case, the materials before us did not justify us to exercise our discretion to grant the extension. Indeed, Dr Sidhu admitted in his affidavit that the delay was due to the inadvertence and mistake of the appellant's solicitors. For the reasons stated above, we dismissed the appellant's application with costs.

It would appear from that judgment that a mistake on the part of a solicitor could not be a ground for the exercise of a discretion to extend the time. Unfortunately, the Supreme Court case of *Sinnathamby & Anor v. Lee Chooi Ying & Anor* was not referred to resulting in what appears to be two conflicting decisions on the question whether the mistake of a solicitor causing a delay could permit a court to exercise a discretion to extend time.

In my view, *Sinnathamby & Anor v. Lee Chooi Ying & Anor* should be preferred. It dwelt on previous cases and gave its reasons for concluding that those decisions which held that the mistake of a solicitor could not be a ground for the court to exercise its discretion to grant an extension of time were no longer good law. This contrasted with *Ooi Bee Tat v. Tan Ah Chim & Sons*

Sdn. Bhd. & Ors which did not refer to *Sinnathamby & Anor v. Lee Chooi Ying & Anor*, its own decision, and consequently it did not say why its own decision should not be followed. Therefore, it would be wrong on the part of the Sessions Court judge if she had dismissed the application for the extension of time solely on the basis that the delay due to the mistake of a solicitor cannot be a factor or ground for the court to exercise its decision to extend time. However, she gave another reason for dismissing the application.

Delay In Applying For Extension Of Time

The Notice of Appeal was filed on 19 March 1998 and served on the Plaintiff's solicitors on 21 March 1998. On 13 April 1998 the defendant was served with Form 141. On 27 April 1998 the defendant filed and served the Memorandum of Appeal on the plaintiff's advocates who accepted the same unconditionally and without protest. The Record of Appeal was filed and served on 27 May 1998 which was not within the three weeks period prescribed under O. 49 r. 6 and again the plaintiff's advocates accepted the record of appeal unconditionally and without protest. The plaintiff then on 27 August 1998 took out a motion to strike out the appeal. The defendant's counsel after the receipt of the notice of this motion then on 9 October 1998 applied to the court to have the time extended.

One of the grounds put forth to implore the exercise of the discretion of the court to extend the time was that the advocate in charge then had only seven months experience and was unaware that the Record of Appeal was served out of time until receipt of the notice of motion. The Sessions Court judge made a finding, based on her understanding of what had been deposed in the affidavits, that it was not true that the advocate concerned did not know that the Record of Appeal was served out of time and that he knew and yet served it on the plaintiff's advocate. The Sessions Court judge was also of the view that the advocate had blamed the plaintiff's advocate for not protesting the service though it was late and that the advocate had therefore blamed the plaintiff's advocate for his own fault which is a conduct not to be encouraged. Thus, it was concluded that there was a delay in the application which had not been satisfactorily explained. In view of the findings, the three affidavits of the advocate, filed in support of the application for extension of time, call for scrutiny.

The first affidavit was affirmed by the advocate on 9 October 1998 containing 21 paragraphs. Though it was admitted that the Record of Appeal was served out of time it was not explained how that came about. Instead the advocate went on to state the receipt of the document by the plaintiff's advocates as not under any form of protest. It was then contended in the affidavit that it

was a mere irregularity which can be corrected. That was all that was said as regards how the service came to be made out of time. The plaintiff's advocate replied to say, *inter alia*, that the defendant "has failed to show sufficient grounds for the delay".

The second affidavit was affirmed on 6 November 1998. The advocate explained that the delay was due to his reading a version of the SCR which did not contain O. 49 r. 6 and that it was the first appeal he was handling being then in practice for only seven months. He said he received Form 141 on 13 April 1998. I pause here to note that under O. 49 r. 3A(3) and r. (4) the Record of Appeal must be filed and served within six weeks of the receipt of Form 141; the last day for service and filing being 25 May. It will be recalled that the advocate only served and filed the same on 27 May which is two days out. The advocate explained this delay by saying that he was at that time busy with other matters and forgot about the deadline until he was reminded by his staff on 26 May whereupon he proceeded to assemble the documents for filing and service that was done on 27 May.

The advocate in the third affidavit affirmed on 11 November contended that the receipt of the documents without protest amounted to a waiver of the lateness of service. He further contended that the delay in applying was due to the silence of the plaintiff's advocate and that advocate should not be allowed to take advantage of it. He also said that the delay was also contributed by his mistaken belief that he had complied with the procedure.

From those affidavits, it can be concluded that the Sessions Court judge was referring to the two days' delay in the filing and service of the Record of Appeal and she was therefore correct in saying that the advocate was aware that it was out of time even if the advocate had proceeded erroneously under O. 49 r. 3A. However, when the advocate referred to the silence of the plaintiff's advocate, he was not trying to exonerate himself from his own fault, as found by the Sessions Court judge, but was trying to explain why he took so many months to make the application for the extension of time. This is what the Sessions Court judge said with regard to this point:

> It would appear that after [the advocate] became aware of the late filing of the record of appeal, he did not take any step to apply for abridgement of time. Instead he filed and served it on the Plaintiff's solicitors and now, instead of owning up to their own mistake and their failure to notice the expiry date, they claimed that Plaintiff's solicitors' conduct of accepting the record of appeal without protest have attributed to the delay in filing this application. I think this kind of conduct of putting the blame on the other party's solicitors when the solicitors themselves are aware of the mistake but fail to take the right step to rectify it, is to be strongly discouraged.

The Sessions Court judge was wrong in the first place when she concluded that the advocate did not own up to his mistakes. He did so profusely by stating so again and again. The second point is that the Sessions Court judge failed to realise that the advocate was explaining, rather than shifting the responsibility for his fault, why he came to make the application for an extension of time so late. So it has to be examined whether he had really explained. The advocate was given ample time and three affidavits in which to explain the delay. He had acceptably explained that he did not follow O. 49 r. 6 because he did not have sight of it. This takes us to the second period of delay which is the two days late in serving and filing the Record of Appeal. This was again explained away that he was preoccupied with other cases without saying what the failure was in the scheduling and reminder system his office employed, which one expects a legal firm to have, as to cause him to miss the deadline. Even accepting that this delay was explained away, there is the third period of delay. This is the delay in applying for an extension of time after he became aware that he was out of time by two days, and which the advocate attempted to explain in his second affidavit in this way:

> 13. Further to my averments as per paragraph 6, 14 and 15 of my Affidavit in support as mentioned above, I wish to state that had the Plaintiff's solicitor accepted the Notice of Appeal and Record of Appeal under protest and without prejudice, I would have been made aware that I was procedurally wrong and I would then have immediately applied to rectify this defect by making the application for enlargement of time and to amend the Record of Appeal.

That, in my view, does not explain why despite knowing he was out of time by two days, when he was acting under the unamended rules, he did not apply immediately for an extension of time before he served and filed the documents. He also did not say why he thought it was alright to serve and file the Record of Appeal at a time when he was two days out. It remains to be determined whether the advocate had explained these in his third affidavit. The only paragraphs that can be considered as coming close to explaining it are these:

> 7. The delay in filing the Notice of Application by six (6) months is not unreasonable or inordinate as I was all along under the misimpression that I was procedurally correct.
>
> 8. I thought that I correctly filed and served the Record of Appeal in accordance to Order 49 rule 3A of Subordinate Courts Rules, 1980. Had the Plaintiff's Solicitor objected to the service of the Record of Appeal or had received it without prejudice or under protest, I would have been alerted and would have filed this application much earlier. In a sense therefore, the Plaintiff's Solicitor has contributed to the delay in my making this application and should therefore not be allowed by the Court to take advantage of the situation.

But the question why he did not apply for the extension of time after realising he was two days out and before he served those documents was left unanswered. Mr. Kho Lik Kiat, learned counsel for the appellant/defendant, conceded that it was not explained. In this regard, the Sessions Court judge was correct when she did not accept the contention of the advocate that he thought he had complied with O. 49 r. 3A (stated in the said para. 8 of his affidavit). The advocate knew he was out of time by two days and could not, therefore, have sincerely held that belief or thought.

Conclusion

Given the circumstances and for the reasons I have stated, the Sessions Court judge was right in refusing the extension of time. The appeal was accordingly on 24 August 1999 dismissed with costs to the plaintiff/respondent.